(15)

FILED
FEB 17

No. 05-260

In the Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

WILLIAM J. NELLIS
Counsel of Record
Secretary to the Board
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

THOMAS C. NYHAN
Executive Director and General Counsel
JAMES P. CONDON
Deputy General Counsel
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

Attorneys for Amicus Curiae

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

TABLE OF CONTENTS

PAGE

Interest of the *amicus curiae* 1

Summary of argument 3

Argument:

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), enables a fiduciary of an ERISA-defined employee welfare benefit plan to secure a judgment for equitable restitution from identifiable personal injury settlement proceeds in the possession of plan covered individuals, in order to enforce the terms of the plan that entitle the plan to reimbursement, from those proceeds, of injury-related medical expense payments by the plan 6

A. Respondent does not have an adequate remedy at law 9

B. Respondent is entitled to restitution *in equity*, in the form of a constructive trust or equitable lien, from the identifiable settlement proceeds in petitioners' possession, as an appropriate equitable remedy within the ERISA enforcement scheme created by Congress 17

C. Petitioners' *make whole* arguments were not raised and considered in the court of appeals, are not included in the

question on which certiorari was granted and are outside the scope of this Supreme Court review 21

Conclusion 25

TABLE OF AUTHORITIES

Cases: PAGE(S)

Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. *Varco*, 338 F.3d 680 (7th Cir. 2003), cert. denied, 542 U.S. 945 (2004) 8

Administrative Committee Of Wal-Mart Associates Health and Welfare Plan v. *Willard*, 393 F.3d 1119 (10th Cir. 2004) 8

Aetna Health Inc. v. *Davila*, 542 U.S. 200 (2004) 15, 16

Barnes v. *Alexander*, 232 U.S. 117 (1914) 20

Bombardier Aerospace Employee Welfare Benefits Plan v. *Ferrer, Poirot and Wansbrough*, 354 F.3d 348 (5th Cir. 2003), cert. denied, 541 U.S. 1072 (2004) 8

Copeland Oaks v. *Haupt*, 209 F.3d 811 (6th Cir. 2000) 24

FMC Corp v. *Holliday*, 498 U.S. 52 (1990) 11, 12, 13, 14

Great West Life & Annuity Ins. Co. v. *Knudson*, 534 U.S. 204 (2002) 6, 7, 8, 9, 10, 17, 20

Heckmann v. *Ahmanson*,
168 Cal.App.3d 119 (Cal. App. 1985) 9

Mid Atlantic Medical Services, Inc. v. *Sereboff*,
303 F.Supp.2d 691 (D.Md. 2004), aff'd,
407 F.3d 212 (4th Cir. 2005),
cert. granted,
126 S.Ct. 735 (2005) ... 3, 7, 8, 14, 17, 18, 20, 22, 23

Owasso Independent School Dist. No. I-011 v. *Falvo*,
534 U.S. 426 (2002) 24

Providence Health Plan v. *McDowell*,
385 F.3d 1168 (9th Cir. 2004),
cert. denied, 125 S.Ct. 1726
(2005) and 125 S.Ct. 1735 (2005) 10, 11, 14

Travelers Indem. Co. v. *Chumbley*,
394 S.W. 2d 418 (Mo. App. 1965) 15

Wylie v. *Coxe*,
56 U.S. 415 (1853) 20, 21

Statutes:

Employee Retirement Income Security Act of 1974:

§ 3(1) and 3(37)(A), 29 U.S.C.
§§ 1002(1) and 1002(37)(A) 1

§ 502(a)(3), 29 U.S.C. § 1132(a)(3) ..... *passim*

§ 514, 29 U.S.C. § 1144 11

Motor Vehicle Financial Responsibility Law (PA): 75 Pa.C.S.A. §§ 1719-20 ..... 11, 14

Miscellaneous:

Brian A. Perez-Daple, *Legal Reimbursement Claims by ERISA Plan Fiduciaries*, 72 U.Chi.L.Rev. 1103 (2005) 14

Restatement of Restitution (1937) 20

INTEREST OF THE *AMICUS CURIAE*

Central States, Southeast and Southwest Areas Health and Welfare Fund ("CS Fund") respectfully submits this brief as *amicus curiae* in support of the respondent, Mid Atlantic Medical Services, Inc. The parties have filed blanket letters of consent to the filing of *amicus curiae* briefs with this Court[1].

The CS Fund is an "employee welfare benefit plan" and a "multiemployer plan" as defined in Sections 3(1) and 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1) and 1002(37)(A), founded in 1950 and funded primarily by thousands of contributing employers, to provide continuing healthcare benefits coverage, on a fully self-funded (non-insured) basis, for many hundred thousand participants (active and retired) and covered dependents. Those covered individuals reside, and receive medical care, throughout the United States. The direct expenses of such benefits coverage incurred by the CS Fund reached a highest annual amount, exclusive of plan administrative expenses, of $1,054,639,636 for the year 2002 (cost containment measures have reduced benefit expenses in subsequent years). For more than twenty years the CS Fund's plan documents have provided, as a condition of benefits coverage, for full reimbursement to the CS Fund of its injury-related benefit payments from injury-related tort liability recoveries by its active and retired participants and their covered dependents. A recent internal audit disclosed that annual gross recoveries from this program

---

[1] This brief has been authored entirely by counsel for the CS Fund. No counsel for a party to this proceeding authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members and its counsel, made a monetary contribution to the preparation or submission of this brief.

to the CS Fund, in the 1995-2004 period, ranged from a high around $5.98 million in 2001 to a low around $4.29 million in 1997. The CS Fund's active and retired benefit plan documents, relative to such full reimbursement rights, have long included (emphasis in originals):

> ". . . The Fund's entitlement to full payment and reimbursement of its Subrogation Rights is absolute and unqualified, and is not to be reduced or impaired by the relationship of the gross or net amount of the Proceeds to the aggregate monetary damages sustained, or claimed to be sustained, by the Covered Individual in connection with the Disability related to his or her Loss Recovery Rights. The Fund's Subrogation Rights are not in any way subordinate to or affected by any 'make whole' rule. . .. The Fund's Subrogation Rights are not in any way subordinate to or affected by any 'common fund' principle or factor—sometimes described as the equitable concept of a 'common fund' which governs the allocation of attorney's fees in any case in which a lawyer hired by one party creates through his efforts a fund in which others are entitled to share as well—the acceptance of plan benefits from the Fund entirely subordinates the Loss Recovery Rights of the Covered Individual to the Subrogation Rights of the Fund (without any 'common fund' reduction or other reduction of those Subrogation Rights). . . ."

The CS Fund's plan documents have also long entitled it, whenever such reimbursement is owed but refused, ". . . to decline to make any payment for any benefits on behalf of the [refusing] Covered Individual, related to any circumstance or condition for which the Fund otherwise has a Coverage obligation, until the amount of such unpaid Coverage is equal to the unrecovered amount of the Fund's Subrogation Rights. . .." If the significant revenue to the

CS Fund from enforcement of these injury-related reimbursement rights were to be eliminated or greatly reduced by the outcome of this case, that result might require the CS Fund to adopt plan amendments reducing or restricting current healthcare benefits coverage.

SUMMARY OF ARGUMENT

In its interpretation and application of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), the court of appeals reached the following conclusions:

> "We agree with the district court that, in this dispute, MAMSI's action seeks restitution, as that term is used in *Knudson*, because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs. First, the funds have not been dissipated, and they are specifically identifiable. . .. [T]he funds . . . can 'clearly be traced to particular funds' recovered in the California litigation. *Knudson*, 534 U.S. at 213, 122 S.Ct. 708.
>
> "Second, the disputed funds belong in good conscience to MAMSI. The Plan contains express, unambiguous reimbursement provisions according MAMSI the 'right to recover any payments' made to the Sereboffs by a third party. Third, the disputed funds are within the possession and control of the Sereboffs. . .."

Mid Atlantic Medical Services, LLC v. *Sereboff*, 407 F.3d 212, 218-219 (4th Cir. 2005).

In their brief on the merits ("Pet.Br."), petitioners make no challenge to the district court's finding that "the funds in question 'belong in good conscience to the Plan' ", stating

that this "is perhaps true as a matter of fairness." Pet.Br., at 21. Petitioners argue that there are, however, insurmountable barriers to respondent's **equitable** restitution (by either a constructive trust or an equitable lien) from their personal-injury settlement proceeds, and that not only does the respondent have an adequate remedy at law (against petitioners) but that equity-required tracing to those proceeds (as a prerequisite of equitable restitution) is impossible. *Id.*, at 17-27.

Petitioners' contention that respondent has an adequate remedy at law, *id.*, at 27, is without merit. As the Court decided in *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990), ERISA pre-emption exempts self-funded ERISA plans (such as respondent) from state antisubrogation laws such as Pennsylvania's. *Id.*, at 61-65. Any state law or state-law remedy for enforcement of a self-funded ERISA plan's rights to reimbursement of injury-related medical expense payments from injury-related settlements, rights which are not independent of ERISA or the plan's terms, falls squarely within the scope of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and is pre-empted. Since that ERISA enforcement provision expressly excludes any non-equitable relief or remedy, respondent has no remedy at law (much less an adequate one) for enforcement of its plan-created right to reimbursement from petitioners.

Petitioners' contention that respondent is not entitled to equitable restitution from the identifiable settlement proceeds in petitioners' possession, Pet.Br., at 17-30, is also without merit. The central theme of petitioners' argument is that, although "the ability to trace the plaintiff's funds is critical", *id.*, at 19, the lack of tracing to respondent's property must defeat its quest for equitable relief:

> "In this case, MAMSI's claim is *not* for return of particular money that the Plan paid to the

> Sereboffs and that the Sereboffs still retain. There is absolutely no evidence in the record that any Plan money was ever paid to the Sereboffs, as opposed to providers of their medical services. . .. Moreover, any money that the Plan paid on behalf of the Sereboffs has already been spent on legitimate medical expenses. What MAMSI is seeking, therefore, is not the return of Plan money or profits from its use or exchange. Rather, MAMSI is seeking to recover new money paid out by third parties, the alleged tortfeasors.
>
> "The district court's assertion that the funds in question ''belong in good conscience to the Plan' . . .' is perhaps true as a matter of fairness. Mere fairness, however, is the wrong criteria by which to judge if a remedy was 'typically available in equity.' . . .
>
> "Whether or not funds 'belong in good conscience' to another, the ability to seek restitution of those funds - absent the tracing described above - was not 'typically available at equity.' [Citation omitted.] . . . ."

Id., at 20-22. That argument overlooks economic realities. Respondent offered, and petitioners accepted the bargain, that respondent would pay the injury-related medical expenses involved ($74,869.37) on condition that, pursuant to the terms of respondent's plan, petitioners would reimburse respondent from their ultimate injury-related settlement proceeds ($750,000). The settlement proceeds ($750,000) resulted in part from, and included reimbursement for, all of the medical expenses involved ($74,869.37). Petitioners' settlement proceeds to that partial extent are the product of, and are traceable to, respondent's medical expense payments. A constructive trust or an equitable lien upon identifiable and non-dissipated settlement

proceeds is a typical equitable remedy to enforce a plan's reimbursement rights and to prevent unjust enrichment.

Petitioners' final point, several *make whole* arguments, Pet.Br., at 30-35, was not raised and considered in the court of appeals, is not included in the question on which certiorari was granted and is outside the scope of this Supreme Court review.

ARGUMENT

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), enables a fiduciary of an ERISA-defined employee welfare benefit plan to secure a judgment for equitable restitution from identifiable personal injury settlement proceeds in the possession of plan covered individuals, in order to enforce the terms of the plan that entitle the plan to reimbursement, from those proceeds, of injury-related medical expense payments by the plan.

The issue now under review reflects a predictable dispute about this Court's decision in *Great West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002). Construing ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)—which among other things authorizes an ERISA plan fiduciary to bring a civil action ". . . to obtain other appropriate **equitable** relief . . . to enforce . . . the terms of the plan" (emphasis added)—this Court in *Knudson* decided that "[b]ecause petitioners are seeking legal relief—the imposition of personal liability on respondents for a contractual obligation to pay money—§ 502(a)(3) does not authorize this action." *Id.*, at 221. The expressed reasoning in *Knudson* provided a roadmap for the federal judiciary and for the resolution of the issue now under review.

The *Knudson* reasoning includes (*id.*, at 213-214; emphasis in original):

> "In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. [Citations omitted.] A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].' [Citation omitted.] Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."

If *Knudson* were intended to preclude **any** court-ordered equitable restitution to an ERISA plan from a personal-injury monetary recovery by a plan covered individual—despite the plan's clearly stated reimbursement rights in that recovery (found in "the terms of the plan")—then the above-excerpted analysis and roadmap would have been superfluous.[2] Such was clearly not,

---

[2] In the case now under review, the United States Court of Appeals for the Fourth Circuit quoted from and then applied the *Knudson* roadmap. *Mid Atlantic Medical Services, LLC* v. *Sereboff*, 407 F.3d 212, 218 (4th Cir. 2005) ("We agree with the

(continued...)

however, the intention of this Court in *Knudson*.

In their brief on the merits, petitioners take no issue with the district court's finding that respondent satisfies the "belonging in good conscience" requirement of the above *Knudson* excerpt, stating that this is "perhaps true

---

[2] (...continued)
district court that, in this dispute, MAMSI's action seeks equitable restitution, as that term is used in *Knudson*, because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs."). Other circuit courts have applied the *Knudson* roadmap in much the same fashion. *Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan* v. *Varco*, 338 F.3d 680, 688 (7th Cir. 2003) ("Thus, under *Great-West Life*, the reimbursement action by the Committee in this unique case is equitable because the funds the Committee seeks to recover are identifiable, are in the control of a defendant, and the Committee is right-fully entitled to the monies under the terms of the Plan. Because those elements are met here, the Committee's claim is equitable under § 502(a)(3)(B) of ERISA . . ."), cert. denied, 542 U.S. 945 (2004); *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer, Poirot and Wansbrough*, 354 F.3d 348, 356 (5th Cir. 2003) ("Unlike the beneficiaries in *Knudson* and *Bauhaus*, the Plan's participant, Mestemacher, has ultimate control over, and thus *constructive* possession of, the disputed funds. . .. This crucial distinction is more than sufficient to warrant a finding that the Plan's action is indeed 'equitable' in nature."), cert. denied, 541 U.S. 1072 (2004); and *Administrative Committee Of Wal-Mart Associates Health and Welfare Plan* v. *Willard*, 393 F.3d 1119, 1125 (10th Cir. 2004) ("Rather, we find that the instant case, rather than involving one for monetary damages, involves exactly the type of equitable restitution claim the Court had in mind in *Great-West*.").

as a matter of fairness." Pet.Br., at 21. Petitioners argue that there are, however, insurmountable barriers to respondent's **equitable** restitution (by either a constructive trust or an equitable lien) from their personal-injury settlement proceeds, and that not only does the respondent have an adequate remedy at law (against petitioners) but that equity-required tracing to those proceeds (as a prerequisite of equitable restitution) is impossible. *Id.*, at 17-30. These arguments are not persuasive.

A. Respondent does not have an adequate remedy at law.

The notion that respondent has an adequate remedy at law against petitioners is lacking in merit.[3] This is an issue left open in *Knudson* ("We express no opinion as to . . . whether a direct action by petitioners against

---

[3] Petitioners contend that respondent has an adequate remedy law, stating that "any claim to an implied-in-fact equitable lien would rest entirely on the grounds that MAMSI had no adequate remedy at law by which to enforce its contractual rights", Pet. Br., at 27, and then observing (with citation to a law review comment) that "[t]he premise of this argument ["MAMSI had no adequate remedy at law. . .."] has not remotely been established." *Id.*, n. 14. That issue, whether or not an adequate legal remedy bars a constructive trust, is one on which certain standard works differ, as the *Knudson* dissent by Justice Ginsburg demonstrates. 534 U.S., at 232. Other works that differ on this issue are cited in *Heckmann* v. *Ahmanson*, 168 Cal.App.3d 119 (Cal.App. 1985), which states that "[i]n California, as in most jurisdictions, an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy." *Id.*, at 134. In the case at bar, respondent has no remedy at law.

respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA. . .."). 534 U.S. at 220. In *Providence Health Plan* v. *McDowell*, 385 F.3d 1168 (9th Cir. 2004), cert. denied, 125 S.Ct. 1726 (2005) and 125 S.Ct. 1735 (2005), the court of appeals concluded that the ERISA plan's state court "breach of contract action . . . does not fall within ERISA's civil enforcement provision, 29 U.S.C. § 1132(a), ... [and] is not preempted under [29 U.S.C.] § 1144 . . . ." 385 F.3d, at 1172-73. Six Circuit Judges joined in a dissent from the denial of rehearing en banc in *McDowell*, the dissent stating in part that "[t]his decision marks a profound change in ERISA law and a significant deviation from Supreme Court and Ninth Circuit precedent." 385 F.3d, at 1175.[4]

---

[4] The dissent in *McDowell* also includes (385 F.3d, at 1176):

> "On the other hand, we have also held that insurers' state common law and equitable reimbursement actions against plan participants were also pre-empted by ERISA. [Citations omitted.]
>
> "Thus, until now, our circuit has taken a consistent view of ERISA preemption in the context of common law and equitable actions between ERISA plan participants and third party insurers. If the cause of action involves an ERISA-governed relationship, the parties are confined to the remedies prescribed by ERISA. This case marks a radical departure from our precedent, allowing an ERISA insurer to pursue independent claims for reimbursement from the plan participant. This cannot be reconciled with our precedent, nor with the Supreme Court's ERISA decisions. . .."

As the six dissenters observed, the holding in *McDowell* that the ERISA plan's state court action for reimbursement "is not preempted" by ERISA § 514, 29 U.S.C. § 1144, "marks . . . a significant deviation from Supreme Court and Ninth Circuit precedent." 385 F.3d, at 1175. By common law rule and state legislation, many states prohibit creation or assignment of reimbursement or subrogation rights in personal-injury claims and recoveries (and a nationwide self-funded plan such as the CS Fund would face a broadside of such state laws unless insulated by ERISA pre-emption). One such state law (a provision in Pennsylvania's Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. §§ 1719-20) reached this Court in *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990). In "hold[ing] that ERISA pre-empts the application of . . . [the Pennsylvania statute] to the [self-funded] FMC Salaried Health Care Plan", *id.*, at 65, the Court applied a broad construction of ERISA § 514, 29 U.S.C. § 1144, stating among other things (498 U.S., at 58-60):

> "Pennsylvania's antisubrogation law 'relate[s] to' an employee benefit plan. We made clear in *Shaw v. Delta Air Lines, supra*, that a law relates to an employee welfare plan if it has 'a connection with or reference to such a plan.' *Id.*, 463 U.S., at 96-97, 103 S.Ct., at 2899-2900 (footnote omitted). We based our reading in part on the plain language of the statute. Congress used the words ' 'relate to' in § 514(a) [the pre-emption clause] in their broad sense.' *Id.*, at 98, 103 S.Ct., at 2900. It did not mean to pre-empt only state laws specifically designed to affect employee benefit plans. That interpretation would have made it unnecessary for Congress to enact ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4), which exempts from pre-emption 'generally' applicable criminal laws of a State. We

also emphasized that to interpret the pre-emption clause to apply only to state laws dealing with the subject matters covered by ERISA, such as reporting, disclosure, and fiduciary duties, would be incompatible with the provision's legislative history because the House and Senate versions of the bill that became ERISA contained limited pre-emption clauses, applicable only to state laws relating to specific subjects covered by ERISA. These were rejected in favor of the present language in the Act, 'indicat[ing] that the section's pre-emptive scope was as broad as its language.' *Shaw v. Delta Air Lines*, 463 U.S., at 98, 103 S.Ct., at 2901.'

* * * * *

"The Pennsylvania statute also has a 'connection' to ERISA benefit plans. In the past, we have not hesitated to apply ERISA's pre-emption clause to state laws that risk subjecting plan administrators to conflicting state regulations. See, *e.g., Shaw v. Delta Air Lines, supra*, at 95-100, 103 S.Ct., at 2898-2902 (state laws making unlawful plan provisions that discriminate on the basis of pregnancy and requiring plans to provide specific benefits 'relate to' benefit plans); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523-526, 101 S.Ct. 1895, 1906-1908, 68 L.Ed.2d 402 (1981) (state law prohibiting plans from reducing benefits by amount of workers' compensation awards 'relate[s] to' employee benefit plan). To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits. See *Fort Halifax*

Packing Co. v. Coyne, 482 U.S. 1, 10, 107 S.Ct. 2211, 2217, 96 L.Ed.2d 1 (1987). Thus, where a 'patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation,' we have applied the pre-emption clause to ensure that benefit plans will be governed by only a single set of regulations. *Id.*, at 11, 107 S.Ct., at 2217.

"Pennsylvania's antisubrogation law prohibits plans from being structured in a manner requiring reimbursement in the event of recovery from a third party. It requires plan providers to calculate benefit levels in Pennsylvania based on expected liability conditions that differ from those in States that have not enacted similar antisubrogation legislation. Application of differing state subrogation laws to plans would therefore frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide. Accord, *Alessi v. Raybestos-Manhattan, Inc.*, *supra* (state statute prohibiting offsetting worker compensation payments against pension benefits pre-empted since statute would force employer either to structure all benefit payments in accordance with state statute or adopt different payment formulae for employers inside and outside State). As we stated in *Fort Halifax Packing Co. v. Coyne*, *supra*, at 9, 107 S.Ct., at 2216, '[t]he most efficient way to meet these [administrative] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.'"

ERISA pre-emption exempts self-funded ERISA plans from state antisubrogation laws such as Pennsylvania's, *id.*, at 61-65, and the parties in the case at bar stipulated in the district court that respondent ". . . is a self-funded employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1)." *Mid Atlantic Medical Services, Inc.* v. *Sereboff*, 303 F.Supp.2d 691, 697 (D.Md. 2004). Despite the broad insulation of nationwide (and other) self-funded ERISA plans from a *patchwork* of conflicting state antisubrogation laws which *FMC* provides, the recognition of an available state-court legal (as distinct from equitable) restitution remedy by the Ninth Circuit in *McDowell* conflicts with *FMC* and strips that insulation away.[5] If for example the CS Fund, in the enforcement of its injury-related reimbursement rights (*see* p. 1-2, *supra*), were to commence such an action in a Pennsylvania state court against one or more of its Pennsylvania covered individuals, no ERISA pre-emption (according to *McDowell*) would apply and the Pennsylvania law addressed in *FMC* (75 Pa.C.S.A. §§ 1719-20) would require dismissal of the CS Fund's state law claim.[6] That such a result cannot be

---

[5] Petitioners cite a recent law review comment, Brian A. Perez-Daple, *Legal Reimbursement Claims by ERISA Plan Fiduciaries*, 72 U.Chi.L.Rev. 1103 (2005). Pet.Br., at 27. The writer concludes that "[t]he Supreme Court could formalistically interpret its most recent precedent to forbid state law reimbursement claims by ERISA fiduciaries against double-collecting beneficiaries, but it ought not do so . . ." (*id.*, at 1126).

[6] ERISA preemption does not compel Pennsylvania or any other state to fashion a state-court legal remedy for affirmative enforcement of self-funded ERISA plans' injury-related reimbursement rights in state court actions. The CS Fund has

(continued...)

reconciled with the *FMC* holding is confirmed by the Court's decision in *Aetna Health Inc.* v. *Davila*, 542 U.S. 200 (2004). That decision prescribes an ERISA litmus test for state laws that approach or fall within the scope of ERISA's enforcement remedy. The Court's opinion includes (*id.*, at 208-210):

> ". . . This integrated enforcement mechanism, ERISA § 502(a), 29 U.S.C. § 1132(a), is a distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans. . .. Therefore, any state-law cause of action that duplicates, supplements, or supplants the

---

[6] (...continued)
only 258 active and retired participants living in Pennsylvania (and their covered dependents), according to its records and a recent count, which also disclose that since the early 1980s it has opened 215 files for enforcement of its injury-related reimbursement rights relative to personal injury claims by Pennsylvania covered individuals. (Where several covered individuals are injured in one accident, only one file is opened.) Absent ERISA pre-emption, the CS Fund would be vulnerable to similar antisubrogation laws in many states in which the CS Fund's participants are much more numerous. An example is Missouri, in which state law (unless pre-empted by ERISA) would preclude enforcement of the CS Fund's injury-related reimbursement rights as a state-law remedy in a state court action. *Travelers Indem. Co.* v. *Chumbley*, 394 S.W. 2d 418, 423 (Mo. App. 1965). The CS Fund has 10,037 active and retired participants living in Missouri (and their covered dependents), according to its records and a recent count, which also disclose that since the early 1980s it has opened 8,278 files for enforcement of its injury-related reimbursement rights relative to personal injury claims by Missouri covered individuals.

> ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted. [Citations omitted.]"
>
> * * * * *
>
> "It follows that if an individual brings suit complaining of a denial of coverage for medical care, where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls 'within the scope of' ERISA § 502(a)(1)(B). *Metropolitan Life, supra*, at 66, 107 S.Ct. 1542. In other words, if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B)."

That litmus test, applied to a self-funded ERISA plan's injury-related reimbursement rights to which the plan ". . . is entitled . . . only because of the terms of an ERISA-regulated employee benefit plan", confirms that any state law or state-law remedy for enforcement of those rights (rights which are not "independent of ERISA or the plan terms") falls squarely within the scope of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and is pre-empted. Since that ERISA enforcement provision expressly excludes any non-equitable relief or remedy, respondent has no remedy at law (much less an adequate one) for enforcement of its plan-created right to reimbursement from petitioners.

B. Respondent is entitled to restitution *in equity*, in the form of a constructive trust or equitable lien, from the identifiable settlement proceeds in petitioners' possession, as an appropriate equitable remedy within the ERISA enforcement scheme created by Congress.

An essential principle recognized by this Court in *Knudson* is (534 U.S., at 213; emphasis in original):

> "In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. See 1 Dobbs § 4.3(1), at 587-588; Restatement of Restitution, *supra*, § 160, Comment *a*, at 641-642; 1 G. Palmer, Law of Restitution § 1.4, p. 17; § 3.7, p. 262 (1978)."

The core of the decision by the court of appeals in *Sereboff* is (407 F.3d, at 218-219):

> "We agree with the district court that, in this dispute, MAMSI's actions seeks restitution, as that term is used in *Knudson*, because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs. First, the funds have not been dissipated, and they are specifically identifiable. . .. [T]he funds . . . can 'clearly be traced to particular funds' recovered in the California litigation. *Knudson*, 534 U.S. at 213, 122 S.Ct. 708.
>
> "Second, the disputed funds belong in good conscience to MAMSI. The Plan contains express,

> unambiguous reimbursement provisions according MAMSI the 'right to recover any payments' made to the Sereboffs by a third party. Third, the disputed funds are within the possession and control of the Sereboffs. . .."

Petitioners appear to concede the "belong in good conscience" issue and rest their argument on the "clearly be traced" issue. Pet.Br., at 17-27. Their argument includes (*id.*, at 19-22):

> "As explained by Professor Dobbs, in order to obtain a constructive trust or equitable lien, the ability to trace the plaintiff's funds is critical:
>
> > '[t]he plaintiff must trace his money or property to some particular funds or assets. Especially when the defendant has taken money, tracing is difficult. In such cases the plaintiff can often prove that the money was taken, but has difficulty in identifying that money with funds in the defendant's accounts. . .. ***If the tracing is incomplete, the rule that requires a res is invoked and the constructive trust is denied, with the result that the defendant is only a simple debtor.***'
>
> 1 Dobbs § 4.3(2), at 593 (emphasis added). . ..
>
> "In this case, MAMSI's claim is *not* for return of particular money that the Plan paid to the Sereboffs and that the Sereboffs still retain. There is absolutely no evidence in the record that any Plan money was ever paid to the Sereboffs, as opposed to providers of their medical services. . .. Moreover, any money that the Plan paid on behalf of the Sereboffs has already been spent on legitimate medical expenses. What MAMSI is seeking,

> therefore, is not the return of Plan money or profits from its use or exchange. Rather, MAMSI is seeking to recover new money paid out by third parties, the alleged tortfeasors.
>
> "The district court's assertion that the funds in question ''belong in good conscience to the Plan' (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident)' is perhaps true as a matter of fairness. Mere fairness, however, is the wrong criteria by which to judge if a remedy was 'typically available in equity.' . . .
>
> "Whether or not funds 'belong in good conscience' to another, the ability to seek restitution of those funds - absent the tracing described above - was not 'typically available at equity.' See *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884) (equitable relief denied, explaining: "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received [citations omitted]. The remedy at law is adequate and complete."); 1 Dobbs § 4.1(1), at 556 (Restitution claims for money are usually claims 'at law.'). . . ."

The brief by the Association of Trial Lawyers of America ("ATLA") as *amicus curiae* includes essentially the same argument (at 9-10).

These arguments by petitioners and the ATLA overlook economic realities. Respondent offered, and petitioners accepted the bargain, that respondent would pay the injury-related medical expenses involved ($74,869.37) on condition that, pursuant to the terms of respondent's plan, petitioners would reimburse respondent from their ulti-

mate injury-related settlement proceeds ($750,000). The settlement proceeds ($750,000) resulted in part from, and included reimbursement for, all of the medical expenses involved ($74,869.37). Petitioners' settlement proceeds to that partial extent are the product of, and are traceable to, respondent's medical expense payments. A constructive trust upon identifiable and non-dissipated settlement proceeds is a typical equitable remedy to enforce reimbursement terms of the plan: "A constructive trust . . . is imposed as a remedy to prevent unjust enrichment." Restatement of Restitution § 160, Comment *a*, at 641 (1937), cited by this Court in *Knudson*, 534 U.S., at 213. An equitable lien is also a typical equitable remedy to prevent unjust enrichment, Restatement of Restitution § 161, Comment *a*, at 650, and "[w]here the equitable lien is on a fund, for example a bank deposit, it is enforced by a direction to pay the claimant out of the fund." *Id.*, Comment *b*, at 651. The judgment by the district court includes such a direction. *Sereboff*, 303 F.Supp.2d, at 696, 701-702. The equitable relief granted by the district court and affirmed by the court of appeals was a necessary remedy to prevent unjust enrichment.

Finally, the existence of a remedy in equity to transfer funds that are the product of litigation is firmly established by decisions of this Court. These include *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914) (in affirming the imposition of a lien upon litigation proceeds, the Court stated in part: "He promised only that if, when, and as soon as he should receive an identified fund, one third of it should go to the appellees. But he promised that. . .. And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing."); and *Wylie* v. *Coxe*, 56 U.S. 415, 420 (1853) (". . . a contingent fee . . . out of the fund awarded . . . . being the

contract, it constituted a lien upon the fund . . .. under the contract the lien on the fund in the hands of the administrator, is a sufficient ground for an equity jurisdiction.") The award of equitable restitution to respondent from petitioners' settlement proceeds, to prevent unjust enrichment, is entirely consistent with Supreme Court precedent.

C. Petitioners' *make whole* arguments were not raised and considered in the court of appeals, are not included in the question on which certiorari was granted and are outside the scope of this Supreme Court review.

Petitioners' final point is entitled: "D. Even If It Constitutes 'Equitable Relief,' the Reimbursement Award Is Not 'Appropriate'." Pet. Br., at 30. The substance of that point includes (*id.*, at 34):

> ". . . [N]o determination has ever been made that any of the $750,000 recovered by the Sereboffs was compensation for past medical expenses that were paid by MAMSI and which, therefore, represent an unjust enrichment which has accrued to the Sereboffs.
>
> "The logic employed in granting the Reimbursement Award would permit plan fiduciaries to include provisions that authorize the reimbursement of all medical expenses paid on a beneficiary's behalf out of legitimate personal injury settlements, regardless of what these settlement payments were actually intended to compensate. This will have devastating consequences to those victims of catastrophic injury: 'In the vast majority of such cases, due to liability insurance policy limits or lack of resources, these victims will never recover from the tortfeasor a settlement which

> fully compensates them for their damages.' [Citation omitted.]
>
> "It strains credulity to suggest that such relief is 'appropriate.'"

Petitioners make no attempt to, and apparently cannot, reconcile these assertions with their concession that "[t]he district court's assertion that the funds in question ''belong in good conscience to the Plan' . . .' is perhaps true as a matter of fairness." Pet.Br., at 21.

Petitioners' final point represents a remarkable shift in their positions. The summary judgment for respondent in the district court was largely based upon the parties' stipulation ("Stip."), which is part of the district court's opinion. *Sereboff*, 303 F.Supp.2d 691, 696-701 (D.Md. 2004). Material parts of that stipulation include (*id.*, at 697-698, 700-701):

> "10. In connection with the injuries suffered by Defendant Marlene Sereboff, the Plan paid medical benefits on her behalf in the amount of $73,778.26. In connection with the injuries suffered by Defendant Joel Sereboff, the Plan paid medical benefits on his behalf in the amount of $1,091.11.
>
> "11. The Plan contains an acts of third parties provision, which states:
>
> > '. . . If you or your dependent receives benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due the Company for benefits

> paid. Any remainder will be yours or your dependents. The Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction. . . .'
>
> "12. On August 11, 2000, John Stein ('Stein'), the Sereboffs' attorney, filed a personal injury action in the Santa Clara County Superior Court on behalf of the Sereboffs. . . ."
>
> * * * * *
>
> "34. On January 23, 2003, the case settled as to all parties in favor of the Sereboffs' claims. All defendants paid $750,000. . . ."

In their petition for a writ of certiorari, petitioners state that the question presented to this Court is as follows (2005 WL 2072284, at i):

> "Can a plan fiduciary bring a civil action against a plan participant to obtain 'appropriate equitable relief' under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3), where a term of the plan requires the participant to reimburse medical expenses advanced by the plan if the participant recovers money from a third-party tortfeasor and possesses such payments in an identifiable fund?"

The Court granted certiorari to review that question. *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 126 S.Ct. 735 (2005). Petitioners repeat that statement *verbatim* in their opening brief on the merits. 2006 WL 165865, at i.

Petitioners' *make whole* arguments, presented as a final point (Pet. Br., at 30-35), were not raised and considered in the court of appeals and are not included in the question

on which certiorari was granted. It is the settled practice of this Court, however, to decide cases on the grounds raised and considered in the court of appeals and included in the question on which certiorari is granted. *Owasso Independent School Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 431 (2002). In addition, the circumstances here are not conducive to a decision whether or not to adopt an ERISA *make whole* rule and, if so, how it is to be fashioned. As the United States Court of Appeals for the Sixth Circuit observed in *Copeland Oaks* v. *Haupt*, 209 F.3d 811, 813 (6th Cir. 2000):

> "In *Marshall*, we adopted the so-called 'make whole' rule of federal common law, which requires that an insured be made whole before an insurer can enforce its right to subrogation under ERISA, unless there is a clear contractual provision to the contrary."

In the case at bar, respondent's plan clearly states that any right of petitioners to be *made whole* is superseded by respondent's rights to reimbursement (Stip., ¶ 11; 303 F.Supp.2d, at 698). No persuasive reason not to enforce respondent's plan as written has been presented.

CONCLUSION

The district court's award to respondent of equitable restitution from the specifically identifiable funds in the petitioners' possession is an appropriate equitable remedy within the ERISA enforcement scheme created by Congress. The decision by the court of appeals, affirming the district court's award of equitable relief, should be affirmed.

February 17, 2006.

Respectfully submitted,

WILLIAM J. NELLIS
Counsel of Record
Secretary to the Board
Central States, Southeast
and Southwest Areas
Health and Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800

THOMAS C. NYHAN
Executive Director and
General Counsel
JAMES P. CONDON
Deputy General Counsel
Central States, Southeast
and Southwest Areas
Health and Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800

Attorneys for Amicus Curiae